UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

Civil Action No. 2519

TOP VISION CABLE, INC., a Kentucky Corporation - *Plaintiff*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner,
ALTON PUCKETT, Commissioner - - - *Defendants*

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment as authorized by Section 2201 of Title 28 of the United States Code, and is brought because there is an actual controversy now existing between the parties of the above-entitled action, as to which the Plaintiff seeks the judgment of this Court.

2. The action arises under the Constitution of the United States, Article I, Section 8, Clause III, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

3. Plaintiff is a corporation organized under the laws of the State of Kentucky. Plaintiff is engaged in providing community antenna television service (CATV) to the public within the corporate limits of the City of Owensboro.

In brief, Plaintiff's business may be described as follows: Signals of nearby and distant television broadcast stations are received off the air by means of a master antenna advantageously located to obtain maximum signal strength and quality. These signals are relayed by means of coaxial cable lines attached to utility poles through amplification equipment to the residences of subscribing members of the public for a fee. The cable is terminated in the home where a connection is made to the subscriber's privately owned television receiver. The subscriber is thus enabled to receive television broadcasts which would not otherwise be available or which would be received with lesser quality.

4. Defendant City of Owensboro is a municipal corporation of the State of Kentucky, and Defendants Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher and Alton Puckett are the members of the Board of Commissioners, the governing body of the City of Owensboro, Kentucky.

5. On or about October 22, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, enacted Ordinance Number 63-65, authorizing the advertisement and sale of a CATV franchise within the City of Owensboro. A certified copy of said Ordinance is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 1", and made a part hereof.

6. On or about December 17, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, adopted Resolution No. 36-65 confirming the sale of the CATV franchise to Plaintiff and granted a CATV franchise to the Plaintiff by way of a "Franchise Agreement", (hereinafter Agreement), described more particularly in and comprising Section 3 of Defendants' Ordinance No. 63-65, referred to hereinabove. Under the terms of the Agreement, Plaintiff must pay to the Defendant an annual gross receipts tax equal to twenty-six percent (26%) of the gross income received by the Plaintiff from all receipts derived

within the City of Owensboro from its CATV system. Certified copies of said resolution and said "Franchise Agreement" are annexed to this Complaint marked "Plaintiff's Exhibit No. 2" and "Plaintiff's Exhibit No. 3", respectively, and made a part hereof.

7. By the terms of the Agreement the Plaintiff's operations must be in accordance with the laws of the United States of America (paragraphs 1 and 7).

8. On March 26, 1970, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont* (hereinafter *Wonderland*) (not yet reported), the United States Court of Appeals for the Sixth Circuit in a controlling case in this jurisdiction struck down the ordinances enacted by the Defendants. These ordinances attempted to impose a gross receipts tax on the respective CATV systems there involved. As in the instant case, the Fremont ordinance required each CATV applicant to submit a bid based upon a percentage of gross receipts to be paid to the City for units of 1,000 or more subscribers. The ordinance enacted by the City of Fremont imposed precisely the same kind of gross receipts tax as has been imposed by the Defendant upon the Plaintiff. However, the tax therein involved was only 3% of the gross receipts of the CATV system. The *Wonderland* decision is, therefore, most relevant in its application to the instant case. A true copy of the opinion of the Court in this case is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 4" and is made a part hereof.

9. In *Wonderland,* the Court of Appeals held the ordinances of both Sandusky and Fremont invalid, *inter alia,* ". . . because they impose a gross receipts tax upon the proceeds of interstate commerce in violation of the commerce clause of the Constitution of the United States" (at page 5).

10. On or about May 23, 1970, representatives of the Plaintiff appeared before a meeting of the Board of Commissioners of the Defendant City of Owensboro and requested that Section 3 of the Agreement providing for a 26% gross receipts tax be renegotiated; Plaintiff's request was founded upon its experience in operating the Owensboro system. Plaintiff explained that the 26% gross receipts tax payments to the city made it most difficult for the Plaintiff to make its CATV system at Owensboro economically viable. Moreover, Plaintiff stated its view that should it be required to continue remitting said tax, it would necessarily impair the quality of CATV service which the Plaintiff would be capable of providing. In Section 3, Paragraph II of the Owensboro Ordinance (Paragraph II of the Agreement), any impairment in the quality of service conceivably could work a forfeit of the Plaintiff's legal right to the franchise, and all rights inhering therein. It was further stated that it was the considered opinion of Plaintiff that *Wonderland* invalidated the gross receipts tax imposed on the Plaintiff by the Defendant, City of Owensboro.

11. Defendant, City of Owensboro, through its Board of Commissioners has stated its refusal to renegotiate the tax.

12. Therefore, even though the constitutional validity of the 26% gross receipts tax imposed upon Plaintiff's operation is in substantial doubt, efforts to seek a judicial determination by means other than through declaratory judgment places Plaintiff in extreme jeopardy in the following ways:

(a) Defendant City of Owensboro, through its Board of Commissioners has indicated its intention to treat the entire franchise as void should Plaintiff fail to remit the said 26% tax or if it be declared invalid. This means

that Plaintiff would lose its business and most likely the $430,000.00 it has invested thus far in attempting in good faith to provide CATV service to Owensboro.

(b) On information and belief, if the 26% tax is declared invalid and if the provisions relating thereto were determined by the Court to be severable from the remainder of the Franchise, certain reprisals would nevertheless be taken by Defendants against Plaintiff. Plaintiff must complete construction of the entire system by December 20, 1970, unless a further extension of time within which to complete construction is granted by Defendant. The Plaintiff on information and belief expects that the Defendants would not permit any additional extensions of time within which to complete the construction of the entire system, thus rendering all of Plaintiff's right forfeited. The inequity of this situation and Plaintiff's dilemma will be apparent to this Court since in large part it is the existence of the 26% tax which not only makes existing operation most difficult but has rendered it virtually impossible to attract the additional capital necessary to complete construction of the system. Plaintiff may not decline to pay the tax nor may it litigate the lawfulness of the tax without loss of its franchise and most if not all of its investment in the CATV system.

13. Therefore, absent the availability of a declaratory judgment procedure and injunctive relief, Plaintiff is effectively foreclosed from seeking judicial review to ameliorate the deleterious effects of the burdensome 26% gross receipts tax in view of Defendants' position which threatens Plaintiff with economic extinction, and is foreclosed from seeking a judicial determination of the lawfulness under the Constitution of the United States of said tax.

14. Plaintiff is willing to pay a lawful and reasonable fee to the Defendant to defray costs which Defendant may

incur relative to the use of the rights of way by Defendant and the privileges granted in the Agreement, and in regulating the operations of Plaintiff. Plaintiff believes a fee so determined to be lawful.

WHEREFORE, Plaintiff prays:

1. Judgment of this Court whether or not Section 3, Paragraph 2 of Defendant's Ordinance 63-65, referred to previously and incorporated and made a part herein, is constitutional under Article I, Section 8, Clause 3 of the Constitutiton of the United States.

2. Should said Section 3, Paragraph 2 of Ordinance 63-65 be determined unconstitutional, and the payment of the gross receipts tax imposed therein is thereby judged contrary to law, judgment of this Court whether or not such Section 3, Paragraph 2 is severable from the remainder of Ordinance 63-65, thereby preserving said remainder's validity.

3. Should said Section 3, Paragraph 2 of Ordinance 63-65 be determined unconstitutional, and the payment of the gross receipts tax imposed therein is thereby judged contrary to law, and that such Section 3, Paragraph 2 is not severable from the remainder of Ordinance 63-65, that this Court determine a lawful fee to be paid Defendant by Plaintiff consistent with Article I, Section 8, Clause III of the Constitution of the United States.

4. Should said Section 3, Paragraph 2 be determined to be so severable, that the Defendant City of Owensboro and all officers thereof and their successors be restrained from treating the remaining valid part of said Ordinance as null and void and of no legal effect; from preventing or attempting to prevent Plaintiff from operating its proposed CATV system for the purpose of providing service to the citizens of Owensboro by withdrawing said franchise, or

otherwise taking reprisals against Plaintiff as a result of its seeking this judicial determination.

McKinley and Howard
By (s) Joseph H. McKinley
100 St. Ann Building
Owensboro, Kentucky

E. Stratford Smith
Smith, Pepper, Shack & L'Heureux
1776 K Street, N.W.
Washington, D.C. 20006
Attorneys for Plaintiff

Exhibits attached to this complaint are omitted.

MEMORANDUM AND ORDER—Entered Nov. 23, 1970

In October, 1965, the Board of Commissioners of the City of Owensboro, Kentucky, enacted Ordinance No. 63-65 empowering the City Manager of Owensboro to advertise and sell "a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna television and audio television and radio signals to the public". Consideration for the franchise was to be a sum equal to the cost of advertising and selling the franchise, plus a percentage of the purchaser's gross income derived from within the City of Owensboro. Plaintiff, a Kentucky Corporation, obtained the franchise with a bid of 26% of its gross income. The original contract between the parties called for substantial completion of the CATV system within two years. However, on written application of plaintiff, the City extended the completion date to December 20, 1970.

Early in 1970 the Court of Appeals for the Sixth Circuit held that two ordinances substantially similar to the

Owensboro Ordinance were unconstitutional because they imposed a gross receipts tax upon proceeds from interstate commerce. Wonderland Ventures, Inc. v. City of Sandusky, Wonderland Ventures, Inc. v. City of Fremont, 423 F. 2d 548 (6th Cir. 1970). Thereafter, plaintiff filed an action in this Court seeking a declaration that Ordinance 63-65 is unconstitutional and a determination of the rights and liabilities of the parties under the 1965 agreement.

On November 6, 1970, the Board of Commissioners of the City of Owensboro approved Resolution No. 56-70 wherein it was conceded that the provision of Ordinance No. 63-65 calling for payment to the City of a certain percentage of the franchise purchaser's gross income "is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States". Defendants have now filed a motion to dismiss the complaint for lack of jurisdiction over the subject matter on the ground that there is no disagreement between the parties regarding the only federal question raised by the complaint. In its response to the motion to dismiss plaintiff urges us to declare Ordinance No. 63-65 unconstitutional and to reach the questions of Kentucky law under the theory of pendent jurisdiction.

Section 2201 of Title 28, United States Code, requires that in every suit for a declaratory judgment an *actual controversy* exist between the parties. In this section the term "controversy" is used in its constitutional sense. U. S. Const. Art. III, §2, cl. 1; Public Service Commission of Utah v. Wycoff Co., Inc., 344 U. S. 237 (1952); Muller v. Olin Mathieson Chemical Corp., 404 F. 2d 501 (2nd Cir. 1968). It is hornbook law that a federal court has no power to hear claims that do not satisfy the "case or controversy" requirement of the Constitution. United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Muskrat v. United States, 219 U. S. 346 (1911). If for any

reason a federal court lacks jurisdiction to hear the only federal claim before it, absent diversity of citizenship it cannot reach other questions of state law raised by the complaint. United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966); California Water Service Co. v. Redding, 304 U. S. 252 (1938).

Questions regarding the "case or controversy" requirement most commonly arise when the facts indicate that the *interests* of the parties are not sufficiently adverse. Usually it is clear from the pleadings that the parties disagree on some point of law. In the case at bar, curiously enough, the usual situation is reversed. While the pleadings and motions clearly indicate that the interests of the parties are adverse, both sides apparently are in complete agreement regarding the only federal question raised.

Counsel have cited no cases directly on point in their supporting memoranda, and we also have been unable to find any. However, after careful consideration, we have concluded that neither the framers of the Constitution nor the Congress could have intended us to rule on a question of constitutional law concerning which no disagreement exists between the parties, merely for the purpose of reaching additional state law questions under the theory of pendent jurisdiction. State issues predominate in this case, and we think that their resolution should be left to the courts of Kentucky. Accordingly, we hold that no actual controversy exists between the parties as to the only federal question raised by the complaint, and that therefore we lack jurisdiction to rule on both the constitutionality of Ordinance No. 63-65 and on the rights and liabilities of the parties under Kentucky law.

In view of our disposition of this case it is unnecessary to rule on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' mo-

tion to dismiss for lack of jurisdiction over the subject matter is SUSTAINED.

November 19, 1970

(s) James F. Gordon
United States District Judge

Copies to:

Hon. Joseph H. McKinley
Hon. E. Stratford Smith
Hon. Hugh D. Moore
11-23-70

COURT OF APPEALS OF KENTUCKY

File No. V-63-71

CITY OF OWENSBORO, KENTUCKY, ET AL. - *Appellants*

v.

TOP VISION CABLE CO. OF KY. - - - - *Appellee*

APPEAL FROM DAVIESS CIRCUIT COURT
SECOND DIVISION

APPELLANT, CITY OF OWENSBORO'S, RESPONSE TO APPELLEE'S PETITION FOR REHEARING

APPELLANT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED ON APPELLEE'S PETITION FOR REHEARING

1. Did the Court overlook a material fact or a controlling statute or decision, or misconstrue the issue, in holding that the voiding of Top Vision's obligation to pay its bid of 26% of its CATV gross receipts vitiated the franchise despite the severability clause contained therein?

2. Did the Court overlook a material statute or regulation in failing to consider the effect of the Federal Communications Commission Regulations of March 31, 1972, in deciding the intent of the City of Owensboro and Top Vision in executing the December 17, 1965, franchise contract?

COUNTERSTATEMENT OF THE CASE

Nothing in Appellee's Statement of Case Requires a Rehearing

Appellee's Statement of the Case contains no showing that Appellee is entitled to a rehearing. Nothing is stated to show that this Court "overlooked a material fact in the record or a controlling statute or decision . . ." or that Your Honors ". . . misconceived the issues presented under the appeal or the law applicable thereto." R.C.A. 1.350.

Appellee Repeats Statement on Original Appeal, Omitting Facts Fatal to Its Claims

The Statement of the Case in the Petititon for Rehearing is addressed to the issues on the original appeal, rather than to the issues now before the Court. It is simply a repeat—largely en haec verba—of the Counterstatement of the Case contained at pages 1-10 of Appellee's original brief. In common with such original Counterstatement of the Case, it omits many vital record facts, including these facts which are *fatal* to Appellee's case:

1. As an express condition of the franchise, Appellee was required to complete its CATV system ". . . to the extent of making available community antenna service to substantially all the citizens of Owensboro, Kentucky, on or before two (2) years from the date . . ." of the franchise, December 17, 1965, or the ". . . franchise shall be and become null and void without notice or further act of the Party of the First Part" (R. 26).

2. Appellee conceded that it had only constructed approximately one-third of the required CATV system within the two year period (R. 35).

3. In two successive extensions (the first for one year, and the second for two years) gratuitously granted by the City to Appellee for the completion of its CATV system,

Appellee made no additions to its system. On December 19, 1970, when Top Vision filed this suit—five years after the granting of the franchise, three years after the initial deadline for the completion of the system,—Top Vision still claimed only to have constructed a CATV system adequate for one-third of the citizens of Owensboro (R. 8).

4. The franchise made the granting of extensions for the completion of the CATV system entirely a discretionary matter with the City, to be exercised only upon written application from the franchise holder ". . . at least sixty days (60) prior to . . ." the deadline for the construction of the system or any extension of such deadline. (Appellee's request for its third extension of time was not made until November 4, 1970, or 14 days after the deadline fixed by the contract R. 28).

The City exercised its discretionary legislative power by declining to grant a third extension of time for compliance with the contractual completion date (R. 28-29).

5. Appellee was selected as the highest and best bidder at the public auction of the CATV franchise solely because of its bid to pay the City 26% of the gross receipts of the CATV business. All other terms and conditions of the franchise offered by the City were fixed in the franchise ordinance; competition between bidders was limited solely to the percentage of gross receipts which the bidder was willing to pay to the City (R. 18).

The City of Owensboro respectfully refers the Court to pages 1-11 of its original brief for its Statement of the Case on the issues presented in the original appeal.

City of Owensboro Accepts Statement of Facts in Court's Opinion

The City accepts the statement contained in the Court's opinion, pages 18 to 20 of the Appendix to the Petition for Rehearing, as a fair and full statement of the case presented on the original appeal, noting only that the Court decided

the case before reaching the issue of Top Vision's failure to complete its CATV system within the contract term as extended.[1]

Issues Now Pending

The issues now before the Court for decision are: (1) Did the Court overlook a material fact or a controlling statute or decision, or misconstrue the issue in holding that the voiding of Top Vision's obligation to pay its bid of 26% of its CATV gross receipts vitiated the franchise contract, despite the severability clause contained therein? and (2) Did this Court overlook a material statute or regulation in failing to consider the effect of the Federal Communication Commission's regulations which became effective on March 31, 1972, in deciding the intent of the City of Owensboro and Top Vision in executing the December 17, 1965 franchise contract?

The facts with respect to each of these issues will be taken up in the City's argument of the issues.

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[1]Top Vision concedes its default in this respect. Its effort to escape this default by estoppel against the City is untenable. *Maryland Casualty Co.* v. *Magoffin, etc.*, Ky., 358 S. W. 2d 353 (1962), *Continental Illinois, etc.* v. *City of Middlesboro*, Ky., 109 F. 2d 961 (6th Cir., 1940), and cases there cited.

ARGUMENT

THE COURT DID NOT OVERLOOK A MATERIAL FACT OR A CONTROLLING STATUTE OR DECISION OR MISCONSTRUE THE ISSUE IN HOLDING THAT THE VOIDING OF TOP VISION'S OBLIGATION TO PAY ITS BID OF 26% OF ITS CATV GROSS RECEIPTS VITIATED THE FRANCHISE DESPITE THE SEVERABILITY CLAUSE CONTAINED THEREIN

Top Vision argues that the severability clause in the franchise requires a holding that the parties intended that the promise of Top Vision to pay 26% of its gross proceeds to the City may be severed from the franchise and yet leave the franchise in full force and effect.

The Court did not overlook the severability clause or the law applicable to it; nor did it misconstrue the issue. Indeed, Top Vision only claims that the Court "failed to give adequate consideration" to it (Appellee's Pet. for Reh., pp. 6-7).

The effect of the invalidation of Top Vision's covenant to pay the 26% of gross receipts in fee upon the remainder of the franchise contract was hotly argued in the original briefs (Appellant's Brief, pp. 18-28; Appellee's Brief, pp. 15-18). The Court's Opinion evidences its careful consideration of the issue. It recited the substance of the severability clause as a part of its review of all of the clauses in the contract (Appendix to Pet. for Reh., pp. 18-19). It resolved this issue against Top Vision in this language:

> "The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue for the city, and the elimination of the clause vitiated the contract. This contention, we believe, is sound."

The City respectfully refers Your Honors to pages 18 to 28 of its original brief for a full treatment of this issue. It asks indulgence in a short additional statement.

The Severability Clause is Part of the Entire Contract, Which Must be Construed as a Whole

The severability clause in the franchise is only one of many clauses in the contract between the City and Top Vision. This contract must be construed as a whole, and enforced in accordance with the intent of the parties as gathered from the language used, the subject matter, the parties' situation, and the conditions under which the contract was written. *L & N* v. *Joseph,* Ky. 1944, 183 S. W. 2d 953, *Reese* v. *Greenlee,* Ky. 1948, 214 S. W. 2d 262.

Test of Severability

The severability test is stated in *Asher, supra,* cited by Top Vision, as follows:

> "The usual test of severability is whether the consideration is so segregated that it may be separately applied to each independent covenant in the Contract." 11 S. W. 2d 114, 115.

Am. Jur. defines a "divisible" contract as follows:

> "On the other hand, a 'divisible contract,' using that term correctly, is one contract and not several. It differs from other contracts, ordinarily, in one respect only—that on performance by one side of each of its successive divisions the party becomes liable for his performance of that division. In other words, a 'divisible contract' is one the performance of which is divided into different groups, each set embracing performances which are the agreed exchange for each other." 17 Am Jur 2d Contracts, Sec. 324, p. 757.

Top Vision's Promise to Pay 26%, Being Illegal, Voids the Contract

It is an unquestioned principle of law that if an important part of the consideration for an indivisible contract is illegal, the contract is invalid. *Johnson* v. *McMillan,* 178 Ky. 707, 199 S. W. 1070 (1918); *Newport Rolling Co.* v. *Hall,* 147 Ky. 598, 144 S. W. 760 (1912); 17 Am Jur 2d, Contracts, Sec. 231, p. 612; Re-Statement of the Law, Contracts, Vol. 2, p. 1124 (1932).

A severability clause is but an aid to the construction of a contract. As stated in 13 A C.J.S. Sec. 1335, page 313:

> "However, a declaration in the contract that is divisible is but an aid to construction and will not justify a court in declaring a clause divisible when in considering an entire contract, it obviously is not."

In *Dorchy* v. *Kansas,* 264 U. S. 287, 44 S. Ct. 323, 68 L. Ed. 686 (1923), the Supreme Court considered the effect of a severability clause in a Kansas statute, one portion of which had been declared unconstitutional. In determining the intent of the legislature, Mr. Justice Brandeis said:

> "Section 28 of the Act (the severability clause) provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." 68 L. Ed. at 690.

The Supreme Court sent the case back to the Kansas Court for a determination of whether Section 19 of the Act then under consideration ". . . is so interwoven with the system (of compulsory arbitration) that the section cannot stand alone."

Subject to the limitations imposed on cities by Sec. 164 of the Kentucky Constitution, the city agrees with Top Vision's statement that "whether a contract clause may be severed from the remainder of the contract without affect-

ing the validity of that contract as a whole 'involves an ascertainment of the intention of the parties, which must be deduced from the contract itself (*Koppers Co.* v. *Asher Coal Min. Co.*, 226 Ky. 492, 11 S. W. 2d 114, 115)'". (Appellee's Pet. for Reh., p. 7). The City of Owensboro—Top Vision franchise contract contains an abundance of evidence that the parties did not intend that the franchise should remain valid, even though Top Vision was relieved of its obligation to pay its bid price of 26% of its gross receipts.

There Were No Divisions of Performance

The franchise contained no divisions of performance by Top Vision which could be set opposite items of performance due from the City. This being the case, the obligation of Top Vision to pay the City 26% of the gross proceeds from its franchised operations was not intended by the parties to be a divisible undertaking.

Kentucky Constitution Requires Franchise be Let to Highest and Best Bidder

The City and Top Vision entered into this franchise contract under the mandate of Section 164 of the Kentucky Constitution, which provides that:

> "Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder . . ."

Both parties thus knew that the City had no power to negotiate the consideration which should be paid for the franchise, and that this had to be fixed by public bidding.

Franchise Was Awarded to Top Vision Entirely on Basis of Its 26% Bid

The franchise advertised and sold by the City fixed all of the terms and conditions of the franchise, leaving blank

only the percent of gross receipts which should be paid by the successful bidder. Thus, only the consideration to be paid was submitted to competitive bidding and Top Vision was awarded the contract solely because of its bid of 26% of its gross receipts. Since this 26% covenant was the sole basis for the award to Top Vision, the striking of this clause removes the entire basis of the agreement between the parties.

The Size of Top Vision's Bid is Significant

The amount bid by Top Vision is in itself significant. The Court has had municipally granted franchises before it on many occasions; it will be taxed to recall any franchise sold at a price as high as that bid by Top Vision. Neither the Board of Commissioners of the City of Owensboro nor the bidder could have regarded this bid as a nominal consideration, or as anything other than an important source of revenue to the City and a heavy burden to the bidder. Indeed, Top Vision alleged that the existence of the 26% provision "made it virtually impossible for the plaintiff to attract either outside equity or working capital from investors. . . ." (R. 8).

City Required to Consider Revenue to be Raised by Franchise Grant

Top Vision errs in arguing that "there is nothing to indicate that the authority to issue franchises was bestowed upon municipalities for any purpose relating to the raising of revenue" (Appellee's Pet. for Reh., p. 8).

The Kentucky Constitution affords a short answer to Top Vision's argument. Section 164 requires the sale of a franchise to be the "highest" as well as the "best" bidder.

Kentucky Utilities Co. v. *Board of Commissioners of the City of Paris*, 254 Ky. 527, 71 S. W. 2d 1024 (1934), in considering the reasons back of the twenty-year limitation on franchises, emphasized the city's interest in revenues to be derived from a franchise sale:

"A reading of the Constitutional Debates reveals that the main purpose behind this section 164 was to insure that every so often the municipality should have the opportunity of revising the terms of the franchise which it had granted as to rates, quality, service, and the like, *and to have the advantage of obtaining from time to time for the franchise its value which most likely would be enhanced by the growth* of population and business. Thus, in the case of Hilliard v. George C. Fetter Lighting & Heating Co., 127 Ky. 95, 105 S. W. 115, 118, 31 Ky. Law Rep. 1330, Judge Carroll, himself a member of the Constitutional Convention of 1890, speaking for the court on this point, said:

'Further illustrating the intention of the section, the limitation of 20 years upon the time for which franchises might be granted was added, as what would be an adequate price for a franchise granted to a public utility corporation to use the streets of a city today might be a mere pittance 20 years hence. The value to the owners of the right granted would keep pace with the growth, wealth, and population of the city, and unless at some future time the city had *the right to obtain additional compensation* for the privilege it would give the grantees of the franchise undue advantage, and *deny to the city the right to exact a consideration* in keeping with the value of the privilege bestowed.'" (Emphasis added).

Other Clauses in Contract Show Severability Clause Doesn't Preserve Franchise When Vital Part Is Invalidated

Many other clauses in the franchise agreement show that the severability clause is "not an inexorable command", but is a rule of construction which this Court properly applied to the Owensboro-Top Vision contract. For

example, the term of the franchise is fixed at 15 years. Suppose this term should be held invalid, or should be reduced to 3 years. Despite the severability clause, Top Vision would not be required to construct a CATV system for the entire city. The parties intended a grant of a term adequate to make construction of the system economically feasible. The term of the contract is thus so vital and so interwoven with other covenants of the contract that it cannot be stricken without destroying the contract.

But suppose that the covenant in the franchise requiring Top Vision to provide one free drop to each parochial school passed by the CATV cable is declared invalid. A proper construction of the contract would require that this covenant be severed from the remainder of the franchise. Parochial schools are only one of a number of public buildings to which free drops must be supplied; the amount involved in the covenant with respect to parochial schools is small; it was not an item considered by the City in determining who should be the successful bidder; and its presence in the contract is not required by any constitutional section.

To accept Top Vision's argument that the severability clause alone is determinative of the intention of the parties leads to the absurd conclusion that all of Top Vision's obligations under the contract could be severed without invalidating Top Vision's franchise, i.e. leaving Top Vision with all of the benefits with none of the burdens.

The 26% covenant is such an important part of the franchise and is so interwoven with the franchise that the parties did not intend that the franchise should survive the striking of the 26% covenant. This Court was thus correct in ruling that ". . . the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the City, and the elimination of the clause vitiated the contract."

THIS COURT DID NOT OVERLOOK A MATERIAL STATUTE OR REGULATION IN FAILING TO CONSIDER THE FEDERAL COMMUNICATIONS COMMISSION'S 1972 REGULATIONS IN DECIDING THE INTENT OF THE CITY OF OWENSBORO AND TOP VISION IN EXECUTING THE DECEMBER 17, 1965 FRANCHISE AGREEMENT

Appellee argues that it is entitled to a rehearing because the Court did not consider the effect of the Federal Communications Commission's regulations which became effective on March 31, 1972; that under these regulations "(i)t is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes", and that this Court's decision "presumptively invalidates most existing CATV franchises in Kentucky" (Pet. Reh. pp. 9-10).

These arguments are fallacious.

26% Fee Fell Under Wonderland v. Sandusky, and Not Under FCC Regulations

The City of Owensboro and Top Vision agreed that Top Vision's 26% CATV franchise fee covenant "is invalid and unenforceable under Article I, Section 8, Clause III, of the Constitution of the United States" as construed in *Wonderland Ventures, Inc.* v. *City of Sandusky*, 423 F. 2d 548 (6th Cir. 1970) (R. 31), which held such a covenant to be an unlawful burden on interstate commerce. This agreement was the basis of the dismissal of Top Vision's suit against the City of Owensboro in the United States District Court for the Western District of Kentucky (R. 30-33). Thus, Top Vision's 26% covenant was not invalidated under any FCC regulation.

Invalidation of Franchise Based on Construction of the Contract and Not on FCC Regulations

This Court's decision that Top Vision's franchise falls with the voiding of the 26% of gross profits franchise fee

covenant is based upon the intention of the parties as expressed in the December 17, 1965 franchise contract. The FCC regulation which went into effect on March 31, 1972, as quoted by Top Vision's brief at page 10 of its Petition for Re-hearing, casts no light on the intention of the City of Owensboro and Top Vision as expressed in their 1965 contract.

FCC Regulations Do Not Forbid Use of CATV Fees for General Municipal Purposes

Appellee mis-states the facts in saying that under the 1972 FCC regulations "(i)t is no longer legally permissible for a municipality to use a CATV franchise to raise revenue for general municipal purposes". No such prohibition is contained at any place in these regulations 76 C.F.R. 1-617. These regulations require only that CATV franchise fees "be reasonable" and suggest 3% to 5% of gross receipts as a reasonable range (App. Pet. for Re-hearing, p. 10). While this range is much less than the 26% bid in 1965 by Top Vision, the granting of CATV franchises remains a lucrative source of municipal revenue, as will be apparent when the Court compares 3% to 5% of gross receipts with the fees provided in other franchises coming before it.

Neither This Opinion Nor the 1972 FCC Regulations Pose Any "Chaos" for Kentucky CATV

Top Vision is not warranted in arguing—entirely outside the record—that this decision (coupled with the 1972 FCC regulations) poses "chaos . . . for CATV throughout Kentucky" or "presumptively invalidates most existing CATV franchises in Kentucky."

As we have shown, this decision is not based on the FCC regulations, but upon the *Wonderland* decision, and this Court's construction of the terms and conditions of the particular contract between the City of Owensboro and Top Vision. It is sheer speculation to forecast what intention

may be attributable to parties to other CATV franchise agreements which are not before the Court.

The current Television Fact Book (recognized by the City of Owensboro and Top Vision as authoritative in Paragraph 10 of the franchise between them, R. 20), Services Volume 1972-1973, Edition No. 42, pp. 465a to 473a lists a total of 54 CATV systems in Kentucky for which franchise fee information is published. Only one of these franchise fees is shown as exceeding 5% of gross receipts—the exception being the franchise in Paris, Kentucky, which calls for a fee of 5.6% of gross receipts.

An existing CATV system is not required to comply with FCC regulations affecting franchise fees until March 31, 1977, or the renewal of the franchise, whichever occurs first (76 CFR 31(b)).

Section 7 of these regulations also provides liberal relief for hardship cases:

> "(a) Upon petition by a cable television system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question." 76 CFR 7(a).

Top Vision is shaking scarecrows at the Court.

CONCLUSION

The Petition for Rehearing should be denied.

Respectfully submitted,

HUGH D. MOORE
RICHARD D. GILLIAM, JR.
GILLIAM & MOORE
324 St. Ann Street
Owensboro, Kentucky 42301

Attorneys for Appellant,
City of Owensboro, Kentucky

APPENDIX "A"

THE COMMONWEALTH OF KENTUCKY

DAVIESS CIRCUIT COURT
DIVISION II

No. 13298

TOP VISION CABLE CO. OF KY., a Kentucky Corporation - - - - - - - - - *Plaintiff*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and
IRVIN TERRILL, Mayor,
WAITMAN C. TAYLOR, Commissioner,
JOHN D. MILLER, Commissioner,
JOHN C. FISHER, Commissioner,
ALTON PUCKETT, Commissioner - - - *Defendants*

BE IT REMEMBERED, That heretofore to-wit, on the 19th day of December, 1970, came the plaintiff, Top Vision Cable Co. of Ky., a Kentucky corporation, by counsel, and filed its Complaint for Declaratory Judgment and Injunctive Relief herein, which is in words and figures as follows, to-wit:

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment as authorized by Section 418.045 of the *Kentucky Revised Statutes*, and is brought because there is an actual controversy now existing between the parties of the above-entitled ac-

tion, as to which the Plaintiff seeks the judgment of this Court.

2. This action arises under the provisions of a certain Franchise Agreement, (hereinafter Franchise Agreement), existing between the Plaintiff and the City of Owensboro, *et al.* (hereinafter Defendants).

3. Plaintiff is a corporation organized under the laws of the State of Kentucky. Plaintiff is engaged in providing community antenna television service (CATV) to the public within the corporate limits of the City of Owensboro. In brief, Plaintiff's business may be described as follows: The signals of nearby and distant television broadcast stations are received off the air by means of a master antenna advantageously located to obtain maximum signal strength and quality. By means of coaxial cable lines attached to utility poles, these signals are relayed through amplification equipment to the residences of subscribing members of the public for a nominal monthly fee. The cable is terminated in the home where a connection is made to the subscriber's privately owned television receiver. The subscriber is thus able to receive television broadcasts which would not otherwise be available or which would be received with lesser quality.

4. Defendant City of Owensboro, Kentucky is a municipal corporation of the State of Kentucky and Defendants Irvin Terrill, Waitman C. Taylor, John D. Miller, John C. Fisher, and Alton Puckett are the members of the Board of Commissioners, the governing body of the City of Owensboro, Kentucky.

5. On or about October 22, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, enacted Ordinance No. 63-65, authorizing the advertisement and issuance of a CATV franchise within the City of Owensboro. A copy of said Ordinance is annexed to this Complaint and is marked "Plaintiff's Exhibit No. 1", and made a part hereof.

6. On or about December 17, 1965, the Defendant City of Owensboro, by and through its Board of Commissioners, adopted Resolution No. 36-65 confirming the issuance of the CATV franchise to Plaintiff and granted a CATV franchise to the Plaintiff under the terms of the Franchise Agreement described hereinabove. Under the terms of the Agreement, Plaintiff must pay to the Defendants an annual gross receipts tax equal to twenty-six percent (26%) of the gross income received by the Plaintiff from all receipts derived within the City of Owensboro from its CATV system. Copies of said Resolution and said Franchise Agreement are annexed to this Complaint, marked "Plaintiff's Exhibit No. 2" and "Plaintiff's Exhibit No. 3", respectively, and made a part hereof.

7. By the terms of the Franchise Agreement, the Plaintiff's operations must be in accordance with the laws of the United States of America (See Paras. 1 and 7 thereof).

8. On March 26, 1970, in the consolidated cases of *Wonderland Ventures, Inc.* v. *City of Sandusky, Wonderland Ventures, Inc.* v. *City of Fremont,* 423 F. 2d 548 (6th Cir. 1970), (hereinafter Wonderland), the United States Court of Appeals for the Sixth Circuit (which includes Owensboro) struck down the ordinances enacted by the defendant cities imposing a gross receipts tax on the respective CATV systems there involved.

9. In *Wonderland,* the Court of Appeals held the ordinances of both Sandusky and Fremont invalid, *inter alia,* ". . . because they imposed a gross receipts tax upon the proceeds of interstate commerce in violation of the Commerce Clause of the Constitution of the United States. On several occasions following this decision Plaintiff sought to re-negotiate the percent of gross receipts payment with Defendants to reflect compensation to the City of Owensboro on the basis of a fee covering the cost of the Defendant City of the use by Plaintiff of the public right of ways

within the City of Owensboro. Defendants refused and still refuse to negotiate in any manner whatsoever. Nevertheless, on August 31, 1970, some five months after the decision in *Wonderland,* the City of Owensboro accepted a payment of $2,241.47, which amount represented full payment of 26% of the gross receipts of Top Vision then due for the preceding six months, ended June 30, 1970.

10. On September 22, 1970, Plaintiff filed an action for a declaratory judgment in the United States District Court for the Western District of Kentucky at Owensboro, naming as defendants therein the same defendants as are designated herein, and asking that the 26% gross receipts tax provision of the Franchise Agreement be adjudged unconstitutional under Article I, *Section* 8, Clause 3 of the Constitution of the United States (hereinafter "Interstate Commerce Clause") and the authority of the *Wonderland* decision. The defendants therein answered plaintiff's complaint with a "Motion to Dismiss', filed October 22, 1970, and for the first time gave notice to Plaintiff of defendants' agreement with Plaintiff's position that the 26% gross receipts tax provision was unconstitutional under the Interstate Commerce Clause and the *Wonderland* decision.

11. Subsequently defendants, City of Owensboro, *et. al.,* filed a further pleading entitled "Reply to Response of Plaintiff To Defendant's Motion to Dismiss For Lack of Jurisdiction and Failure to State Facts Upon Which Relief Can Be Granted", attaching to this further response a copy of a certain "Resolution No. 56-70". Said Resolution is annexed to this Complaint, marked "Plaintiff's Exhibit No. 4" and made a part hereof. This Resolution, enacted subsequent to the Plaintiff's initiation of the declaratory judgment action, officially conceded the constitutional invalidity of the 26% gross receipts tax provision under the Interstate Commerce Clause. As is pointed out hereinafter in said Resolution the defendants simultaneously refused Plaintiff's pending request for an extension of time within

which to complete construction of the system. Whereupon, based upon the apparent agreement between the plaintiff and the defendants in that proceeding respecting the invalidity of the 26% gross receipts tax provision, the Court found that no "actual controversy" existed between the parties and therefore dismissed the Plaintiff's action because of a lack of jurisdiction. The Court stated that since state issues was most properly a matter for the courts of Kentucky. A copy of that court's "Memorandum and Order", is annexed to the Complaint, marked "Plaintiff's Exhibit No. 5" and made a part hereof.

12. Paragraph 12 of the Franchise Agreement provides:

> The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the Citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. As hereinbefore noted at Paragraph 11, by letter dated October 20, 1970, Plaintiff officially requested of the Defendants a further extension of time from and after December 20, 1970, to complete construction of its CATV

system in the City of Owensboro, such request being based on the identical circumstances supporting the prior two requests.[1] As stated at Paragraph 11 hereof, by Resolution No. 56-70 (Plaintiff's Exhibit No. 4 hereto) enacted subsequent to Plaintiff's initiation of its Federal Declaratory Judgment action, Defendants summarily denied Plaintiff's request.

14. Commencing almost immediately after execution of the Franchise Agreement, Plaintiff encountered unexpected, unforeseeable and severe hardships wholly beyond its control in proceeding to complete construction of its CATV system. Two basic factors unforeseen by Plaintiff have prevented completion of the system.

(1) FCC prohibition against importation of distant signals into the top 100 markets, resulted in a severe loss of subscribers and a concomitant loss of working capital needed for completion of the system. It became an imperative of providing the service needed by the people of Owensboro for Top Vision to concentrate its funds and efforts toward seeking relief at the FCC.[2]

(2) After the foregoing FCC action the existence of the 26% tax provision made it virtually impossible for the Plaintiff to attract either outside equity or working capital from investors, said capital to have been utilized as an alternative source of construction capital to substantially complete the system.

---

[1]This request did, however, indicate that in addition to FCC problems, Top Vision had been experiencing grave difficulty in getting potential capital investors to commit funds in view of the 26% gross receipts tax imposed upon the system.

[2]Owensboro, Kentucky is located within the primary service area of television stations operating in Evansville, Indiana, one of the nation's largest television markets. Under FCC rules and policy adopted subsequent to issuance of the Top Vision Franchise, non-local television stations are not being authorized for carriage by CATV systems operating in the 100 largest television markets of which Evansville, Indiana is the 92nd.

15. Notwithstanding these serious difficulties, Plaintiff has to date expended in excess of $430,000.00 in connection with its Owensboro CATV system, and cable service is presently available to approximately one-third of the citizens of the City.

16. In recognition of the extreme difficulty encountered by Plaintiff from the FCC, Defendants have twice granted extensions of time within which to complete the system. Resolutions 60-67, dated October 6, 1967, and attached hereto as Plaintiff's Exhibit No. 6, sets forth the first extension. This resolution specifically recognizes the fact that the Commissioners ". . . deem said request for an extension of time to be reasonable; . . ." since ". . . the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission . . ." In the most recent grant the Defendants by Resolution No. 66-68 adopted December 20, 1968, granted a two year extension to and including December 20, 1970. Therein the Defendants expressly stated that the City ". . . deem(s) the unforeseen stringent regulation of the Federal Communications Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system within the City." A complete copy of Resolution No. 66-68 is attached hereto as Plaintiff's Exhibit No. 7.

17. The denial of the most recent extension request by Defendants was an arbitrary abuse of discretion in view of the fact that circumstances before the FCC are substantially unchanged. Moreover, the Defendants have exhibited bad faith insofar as they have contributed directly and substantially to the very situation which has prevented Plaintiff from completing construction by exacting an unlawful fee. Plaintiff has been given no fair and reasonable opportunity to complete construction. Plaintiff was not

notified until November 6, 1970, after it had filed its action in Federal Court that Defendants would not grant a further extension of time within which to complete construction. Thus, it is impossible for Plaintiff to complete construction by December 20, 1970 and Defendants by their own actions have forced a lapse of Plaintiff's Franchise in the absence of relief by this Court through absolutely no fault or omission by Plaintiff.

18. Defendants herein have asserted the position before the Federal Court and privately to Plaintiff that the effect of the *Wonderland* decision is to cause forfeit of Plaintiff's franchise since in Defendant's view the gross receipts tax is not severable from the remainder of the Franchise Agreement. Defendants have sought to regulate the operation of Plaintiff's CATV by ordinance and Franchise as a public utility. Plaintiff has in the past subjected itself voluntarily to the franchise procedure but in so doing has not at any point conceded that such was a necessary part of doing business in the City of Owensboro. Plaintiff now denies that there exists statutory authority vested in the City of Owensboro to permit that municipality to so regulate its operations as a CATV system. In this regard Plaintiff asserts that:

(a) The defendant City has no power or authority generally to franchise community antenna television systems because they are not public utilities subject to municipal regulation and control.

(b) Defendants have no power or authority to require that the construction, operation and maintenance of Plaintiff's system shall be dependent solely upon permission of the defendant City.

(c) Defendants have no power of authority to control the time within which Plaintiff shall obtain permits from any appropriate regulatory agency or commence or complete construction of its facilities.

(d) Defendants have no power or authority to require Plaintiff to donate a portion of its property to the defendant City nor to provide free service to other public and private bodies.

(e) Defendants have no power or authority to require Plaintiff to bid with others for the right to engage in a lawful business on the basis of the largest cash payment and percentage of income to be paid to defendant City.

(f) Defendants have no power or authority to grant a so-called non-exclusive franchise for operation of a community antenna television system in the City of Owensboro which is to be awarded on the basis of bids and will have the practical effect of creating a government imposed monopoly in such business.

19. Therefore, even though the Defendants have conceded the constitutional invalidity of the 26% gross receipts tax, Plaintiff remains in extreme jeopardy in the following ways:

(a) Defendant City of Owensboro through its Board of Commissioners has stated its intention to treat the entire Franchise as void. This means that Plaintiff would lose its business and most likely the more than $430,000.00 it has invested thus far in attempting in good faith to provide CATV service to Owensboro.

(b) The Defendant City of Owensboro through its Board of Commissioners on November 6, 1970, refused to grant Plaintiff's request for extension of time to complete construction. This was an arbitrary and abusive action taken as reprisal against Plaintiff for raising a question as to the validity of the 26% tax in view of the *Wonderland* decision.

The inequity of this situation and Plaintiff's dilemma will be apparent to this Court since it is in large part the existence of the 26% tax which not only renders existing operation most difficult but has rendered it impossible to attract the additional capital necessary to complete construction of the system.

20. Plaintiff is willing to pay a lawful and reasonable fee to the Defendants to defray costs which Defendants may incur relative to the use of the right of ways by Plaintiff. Defendants may not unreasonably withhold such use of the right of ways from Plaintiff in connection with the conduct of Plaintiff's lawful and desirable business.

21. The damages which will be suffered by the Plaintiff unless equitable relief is granted are irreparable and Plaintiff has no adequate remedy of law.

WHEREFORE, Plaintiff prays:

(1) For a judgment declaring and adjudicating that Defendant City of Owensboro has no legislative authority to require that local CATV operations be franchised by the City.

(2) For a judgment declaring that Defendants may not unreasonably withhold use of the public right of ways from Plaintiff and that any charges made therefor be reasonably related to the costs to Defendants of Plaintiff's use.

(3) For a judgment in the alternative declaring and adjudicating the rights and duties of the Plaintiff and Defendants under the provisions of the Franchise Agreement, including but not limited to, the following:

(a) That Section 3, Paragraph 2 of the Agreement is severable from the remainder of the Agreement, thereby preserving said remainder's validity.

(b) That equity requires that Plaintiff be granted an additional, sufficient and reasonable period within

which to complete construction of its CATV system.

(c) That the Court determine a reasonable fee to be paid Defendant City by Plaintiff, to defray costs which Defendants incur relative to the use of the public right of ways consistent with the Interstate Commerce Clause of the Constitution of the United States.

(d) That the Court order Defendants to refund to Plaintiff all monies received from Plaintiff pursuant to the unlawful 26% gross receipts tax.

(e) That the Court prohibit Defendants during the pendency of this action from soliciting or considering bids or granting a Franchise for a CATV operation within the City of Owensboro to any party.

(f) That the Defendant City of Owensboro and all Officers thereof and their successors be restrained from treating the remaining valid part of said Agreement as null and void and of no legal effect, and from preventing or attempting to prevent Plaintiff from operating its CATV system for the purpose of providing service to the citizens of Owensboro by withdrawing said franchise, or otherwise taking reprisals against Plaintiff as a result of its seeking this judicial determination.

Wyatt, Grafton & Sloss
Third Floor
Marion E. Taylor Building
Louisville, Kentucky 40202

/s/ Edgar A. Zingman
/s/ Stuart E. Lampe
McKinley & Howard
/s/ Joseph McKinley
Counsel for Plaintiff

Smith, Pepper, Shack & L'Heureux
1776 K Street, N.W.
Washington, D. C. 10008
Of Counsel

Complaint & Exhibits 1, 2, 3, 4, 5, 6 & 7, each filed.
Civil Summons & 6 copies issued to Daviess Co. Dec. 19, 1970.

Attest: James W. Clayton, Clerk
By: Jean P. Moure, D. C.

EXHIBIT 1

ORDINANCE NO. 63-65

AN ORDINANCE DIRECTING THE CITY MANAGER OF THE CITY OF OWENSBORO, KENTUCKY, TO ADVERTISE AND PUBLICLY SELL A FRANCHISE AUTHORIZING THE PURCHASER THEREOF TO USE THE PUBLIC WAYS, STREETS, HIGHWAYS, BRIDGES, OR PUBLIC PLACES OF THE CITY OF OWENSBORO, KENTUCKY, FOR THE PURPOSE OF SUPPLYING VISUAL AND AUDIO TELEVISION AND RADIO SIGNALS TO THE PUBLIC.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. The City Manager of the City of Owensboro, Kentucky, is hereby authorized and directed to advertise and publicly sell, subject to the approval of the Board of Commissioners, a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna

television and audio television and radio signals to the public.

SECTION 2. The notice of said sale of franchise shall be posted on the public bulletin board at the City Hall and shall be advertised at least once, said publication to be not less than seven (7) days nor more than twenty-one (21) days prior to said sale; said sale date shall be on November 16, 1965, at 10:00 A.M., CST, in the lobby of City Hall and shall be made to the highest and best bidder at such sale; however, the City retains the right to reject any and all bids.

SECTION 3. The advertisement of sale shall contain a description of the franchise to be sold. The terms and conditions of said franchise to be granted in the event the sale is confirmed shall be as follows:

> This Franchise Agreement made and entered into on this the ____ day of _____, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and _____ Party of the Second Part.
>
> WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, uni-directional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to % of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates

shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint useage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any

other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party shall provide adequate facilities for maintenance of same. These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage; provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna televi-

sion, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except those specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city, agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other pub-

lic ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bounds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, the party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is

corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due diligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a

resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any manner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not effect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

City of Owensboro, Kentucky

Attest: By _____
Mayor

_____
City Clerk

_____

SECTION 4. The City Manager shall report the sale of said franchise to the Board of City Commissioners which shall then either affirm or reject said sale. In the event of the affirmation of the sale, said Board of Commissioners shall direct the execution and delivery of the franchise to the buyer by the Mayor and City Clerk.

SECTION 5. All ordinances or parts of ordinances in conflict herewith are to the extent of such conflict hereby repealed.

Introduced, publicly read and approved on first reading this 15th day of October, 1965.

Publicly read and approved on second reading this 22nd day of October, 1965.

/s/ Dugan Best
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true

copy of said Ordinance as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

(s) Adelle Shelton, City Clerk

EXHIBITS 2 and 3

RESOLUTION NO. 36-65

RESOLUTION CONFIRMING SALE OF THE CATV FRANCHISE TO TOP VISION CABLE COMPANY, INC.

WHEREAS, by Ordinance No. 63-65, a Community Antenna Television Franchise was created and defined. Said ordinance also directed the City Manager to advertise for and sell said Franchise, and

WHEREAS, on November 16, 1965, the City Manager of the City of Owensboro did make such sale of franchise to the highest and best bidder, Top Vision Cable Company, Inc. as indicated in his Report of Sale heretofore made to the Board of Commissioners of the City of Owensboro.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. That the sale of the CATV Franchise by the City Manager of the City of Owensboro, Kentucky, to the highest and best bidder, the Top Vision Cable Company for 26% of the gross proceeds of its income as shown on the report of such sale, be, and the same is hereby confirmed, ratified and approved.

SECTION 2. The Mayor and the City Clerk of the City of Owensboro are hereby authorized and directed to execute the Franchise Agreement as defined and created by Ordinance 63-65 and deliver same to the said Top Vision Cable Company, Inc.

Introduced, publicly read and finally approved on one reading this 17th day of December, 1965.

/s/ Dugan Best
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

This Franchise Agreement made and entered into on this the 17th day of December, 1965, by and between the City of Owensboro, Kentucky, a municipal corporation of the second class, Party of the First Part, and TOP VISION CABLE COMPANY, INC. OF KENTUCKY, Party of the Second Part.

WITNESSETH: That for and in consideration of the public service to be rendered by the party of the second part to the residents of Owensboro, Kentucky, and the further consideration as more fully set out herein, the party of the first part does hereby grant unto the party of the second part, its successors and assigns, for a period of fifteen (15) years from the date hereof, the franchise and privilege of using the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the supplying of visual and audio television and radio signals to the public, subject to the following terms, conditions and covenants, to-wit:

1. The party of the second part, its successors or assigns, shall have the franchise, privilege, right and power to erect, install, construct, re-construct, replace, remove, repair, maintain and operate in or upon, under, above, across and from the streets, avenues, highways, sidewalks, bridges and other public ways, easements, right-of-way and lands, as now existing and all extensions thereof and additions thereto, in the City of Owensboro, Kentucky, all equipment, facilities, appurtenances and apparatus of any nature for the purpose of receiving, amplifying, transmitting and distributing therefrom radio, electrical and electronic energy, pictures, sounds, signals, impulses and communication, unidirectional and multi-directional of every nature and description, audio and video, embracing any and all of the frequencies of the electrical magnetic spectrum and to otherwise engage in the business, services and activities generally known as and practiced now and in the future by community antenna television and audio communication services in accordance with the laws of the United States of America, the Commonwealth of Kentucky and the City of Owensboro, Kentucky, for a period of fifteen (15) years from and after the date hereof; but subject to the restrictions and provisions herein contained.

2. The party of the second part, in consideration of the terms of this franchise, agrees to pay to the party of the first part a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by first party to second party plus the sum of money equal to 26% of the gross income received by the party of the second part from all sources whatsoever derived within the City of Owensboro, the payment of which shall be payable one-half (½) thereof in semi-annual payments. Said semi-annual payment dates shall be the 30th day of June and the 31st day of December of each year and each semi-annual payment shall be made within 30 days thereafter. The party of the

second part shall keep complete records of accounts showing dates and payments received and any duly authorized agent of the City of Owensboro shall have the right, power and authority to inspect the gross monthly income records of the party of the second part.

3. There is hereby granted to the party of the second part, insofar as the City of Owensboro may legally grant same, the further right, privilege and authority to lease, rent or in any other manner obtain the use of towers, poles, lines, cables and other equipment and facilities from any city owned utility and any and all holders of public licenses and franchises within the corporate limits of the City of Owensboro, subject to all existing and future ordinances, regulations and laws of the City of Owensboro and the Commonwealth of Kentucky. It is the stated intention of the party of the first part that all holders of public licenses and franchises within the corporate limits of the City of Owensboro shall cooperate with the party of the second part to allow party joint useage of their poles and pole-line facilities whenever possible and whenever such use does not interfere with the normal operations of such poles and pole-lines. However, the party of the second part shall own and have complete responsibility for the maintenance and operation of the full system and that responsibility shall not be divided. Prior to the erection or installation of any such towers, poles, guys and anchors on any municipal properties, including public ways and easements, the party of the second part shall secure approval of said location by the City Manager of the City of Owensboro or any other authorized person designated by the City and also secure approval from any state or county official of any locations on the properties, including public ways and easements of the State of Kentucky and County of Daviess. Such permission shall not be unreasonably withheld on the part of the City.

4. The party of the second part shall, during the existence of this franchise, furnish reasonable, adequate and efficient community antenna reception service to the subscribers connected to its system within the corporate limits of the City of Owensboro and said party of the second part agrees to construct and maintain its system in reasonable repair and working order, said system to be constructed with top grade American made equipment and second party shall provide adequate facilities for maintenance of same. These maintenance requirements may be temporarily suspended by disaster or emergency conditions or other circumstances beyond its reasonable control.

5. The party of the second part shall charge only reasonable rates for the service rendered to its customers, but shall not as to any rates, charges, service facilities, rules, regulations or in any other respect make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage; provided, however, they shall not be deemed to prohibit the establishment of a graduated scale of charges and classified rate schedules to which any customer, within such classification shall be entitled.

6. The party of the second part shall not directly or indirectly engage in any phase of the business of television receiving set sale, lease, repair or maintenance within the City of Owensboro, Daviess County, Kentucky, nor shall it use its community antenna television, radio and audio communication services constructed under this franchise for the purpose of pay television.

7. No privilege or exemption is granted or deferred by this franchise except these specifically prescribed herein. Any privilege claimed under this franchise in any street, public way or easement shall be subordinate to any prior lawful occupancy of the street and to all laws, ordinances and regulations of the City of Owensboro, State of Kentucky and the United States of America. No rights, franchise or privileges herein granted are to be exclusive.

8. The party of the second part shall at all times indemnify, protect and save harmless the City of Owensboro, any official, agency, commission or board thereof from and against any and all liability, losses and physical damage to property and bodily injury or death to persons, including payments made under Workmen's Compensation laws which may arise out of or be caused by the erection, construction, replacement, removal, maintenance and operations of the party of the second part's community antenna television and audio communications service and resulting from or by any negligent fault or misconduct on its part or by its agents, officers, servants and employees and it shall carry a policy or policies of liability insurance indemnifying all loss, damage or destruction of property to the extent of $25,000.00 and as to any one person, city, agency or board in the amount of $100,000.00 and as to any one accident resulting in liability on account of injury to or death of one person and in the amount of $300,000.00 as to any one accident as it may relate to damages to persons and property.

9. The party of the second part shall, in the case of any opening or obstruction in the streets or other public ways of the City of Owensboro made by it in the course of construction, operation or removal of its installations, guard such activity by the placement of adequate barriers, fences or boardings, the bounds of which during the periods of dusk and darkness shall be clearly designated by warning lights. In the case of any disturbance or damage to any streets or public ways occurring in the course of erection, installation, construction, reconstruction, replacement, removal, repair, maintenance or operation, the party of the second part shall properly repair and restore same at its own expense. In the event that at any time the party of the first part shall lawfully elect to alter any street, alley or other public way, to party of the second part shall, upon reasonable notice, remove or relocate its poles, wires, cables, conduits or other fixtures at its own expense.

10. The party of the second part shall include in its coverage to its customers any telecast originating from a transmitter located within a forty (40) air mile radius from the City of Owensboro, Kentucky, provided that such telecasts effect either a Grade A, or Grade B, contour in the City of Owensboro as indicated in the current edition of Television Factbook, or any other authoritative publication carrying such designation. It is further agreed and understood that notwithstanding any of the foregoing, the party of the second part shall at all times include within its coverage to its customers telecasts from all of the major networks.

11. The party of the first part may declare a forfeiture of the franchise herein granted in the event of substantial violation of any of the terms hereof upon written notice to the party of the second part specifying the nature of the violation unless such violation is corrected or ceases to exist within sixty (60) days from the date of the written notice of same to the party of the second part. Such forfeiture shall be by resolution of the Board of Commissioners of the City of Owensboro, Kentucky.

12. The party of the second part shall, within sixty (60) days from the date hereof, make proper application to the Federal Communications Commission and to any and all other governmental agencies, both state and federal as is provided by law, for any permits, licenses or approvals necessary to construct, maintain and operate the system. The party of the second part shall commence the construction of the system herein at a reasonable time from the securing of such permits, licenses and approvals and shall prosecute such construction with due dilligence; it being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Kentucky, on or before two (2) years from the date hereof or this franchise

shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof.

13. The franchise, right, privilege and power herein granted, together with all of the terms and conditions hereof, shall extend and apply to the successors and assigns of the party of the second part, however, no assignment of same may be made, except by operation of law, until said assignment has been approved by a resolution of the Board of Commissioners of the City of Owensboro, Kentucky, which approval shall not be unreasonably withheld. In the event such assignment takes place with such consent, then immediately upon the delivery to the City of Owensboro of the aforesaid agreement of assignment, duly executed by the assignee, all of the rights, obligations and privileges herein granted to the second party shall forthwith devolve upon the assignee who shall in all respects stand in the place and stead of the original corporation hereunder. In the event the party of the second part, or its successors or assigns shall be adjudged bankrupt or placed in receivership, the party of the first part may, at its option, declare the rights herein granted to be forfeited and terminated.

14. As part of the consideration for the rights and privileges herein granted, the party of the second part agrees to provide one free drop, with no monthly service charge to the City Hall building, fire and police stations, public library and to all public and parochial primary and secondary schools located within the City of Owensboro, Kentucky, which are passed by a cable.

15. It is agreed and understood that the party of the second part shall not erect its receiving tower in an area of Daviess County, Kentucky, that will interfere in any man-

ner with aircraft approaches to the Owensboro-Daviess County Airport and shall secure approval of such location from the F.A.A. prior to constructing such receiving tower.

16. In the event any section, clause, paragraph or provision of this grant shall be declared invalid by a court of competent jurisdiction, such invalidity shall not effect the validity of this grant as a whole, or any part thereof, other than the part declared invalid.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto on this the day and date first hereinabove written.

City of Owensboro, Kentucky

By /s/ Dugan Best
Mayor

Attest:

/s/ Adelle Shelton
City Clerk

(Seal)

Top Vision Cable Company, Inc.
of Kentucky

By /s/ Harold R. Sagraves
Vice-President

STATE OF KENTUCKY }
} SCT.
CITY OF OWENSBORO }

The undersigned as City Clerk of the City of Owensboro, Kentucky, hereby certifies that the above is a true copy of Franchise Agreement as same appears on the records of the City of Owensboro, of which records the undersigned is legal custodian.

This July 24, 1970.

/s/ Adelle Shelton
City Clerk

EXHIBIT 4

RESOLUTION NO. 56-70

RESOLUTION DENYING REQUEST FOR EXTENSION OF TIME TO COMPLETE SYSTEM AND CONCEDING THE INVALIDITY OF SECTION 2 OF THE FRANCHISE AGREEMENT OF TOP VISION CABLE COMPANY, INC. PROVIDING FOR PAYMENT OF 26% OF ITS GROSS PROCEEDS.

WHEREAS, the Top Vision Cable Company, Inc. of Kentucky agreed to complete the construction of a CATV system in the City of Owensboro to the extent of making available to substantially all the citizens of Owensboro CATV service on or before December 17, 1967, and,

WHEREAS, the City of Owensboro, pursuant to written application of Top Vision Cable Company, Inc., has extended the time for completion of said system to December 20, 1970, and,

WHEREAS, on the 4th day of November, 1970, the said Top Vision Cable Company, Inc. did deliver to the City a written request bearing date of October 20, 1970, for an extension of an additional one year period from December 20, 1970, for the completion of said system, and,

WHEREAS, the City of Owensboro does not deem further extension of time for the completion of said system to be in the interests of the citizens of Owensboro, and,

WHEREAS, the City of Owensboro wishes to officially concede and agree with the position taken by Top Vision Cable Company, Inc. that the agreement of said company to pay the City 26% of the gross income of the Top Vision Cable Company, Inc. derived in the City of Owensboro in consideration of the franchise agreement it holds is invalid under the interstate commerce clause of the United States Constitution,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. The request of Top Vision Cable Company, Inc. for an extension of time from and after December 20, 1970, for the substantial completion of its CATV system in the City of Owensboro is hereby denied.

SECTION 2. The City of Owensboro does hereby officially declare its concession to and agreement with the position of Top Vision Cable Company, Inc. that its agreement to pay to the City 26% of the gross proceeds realized by it from the operation of a CATV system in the City of Owensboro is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States.

Introduced, publicly read, rule suspended, and finally adopted this 6th day of November, 1970.

/s/ Irvin Terrill
Mayor

Attest:

/s/ Adelle Shelton
City Clerk

STATE OF KENTUCKY
COUNTY OF DAVIESS

I, Adelle Shelton, City Clerk of the City of Owensboro, Kentucky, hereby certify that the above is a true copy of Resolution No. 56-70 as finally approved by the Board of Commissioners of the City of Owensboro, Kentucky, on November 6, 1970, as same appears of record in my office, of which records I am legal custodian.

This November 10, 1970.

/s/ Adelle Shelton
City Clerk

EXHIBIT 5

In the

UNITED STATES DISTRICT COURT

For the Western District of Kentucky
at Owensboro

Civil Action No. 2519

TOP VISION CABLE, INC. - - - - - *Plaintiff*

v.

CITY OF OWENSBORO, KENTUCKY, ET AL. - *Defendants*

MEMORANDUM AND ORDER

In October, 1965, the Board of Commissioners of the City of Owensboro, Kentucky, enacted Ordinance No. 63-65 empowering the City Manager of Owensboro to advertise and sell "a franchise authorizing the purchaser thereof to use the public ways, streets, highways, bridges or public places of the City of Owensboro, Kentucky, for the purpose of supplying community antenna television and audio television and radio signals to the public". Consideration for the franchise was to be a sum equal to the cost of advertising and selling the franchise, plus a percentage of the purchaser's gross income derived from within the City of Owensboro. Plaintiff, a Kentucky Corporation, obtained the franchise with a bid of 26% of its gross income. The original contract between the parties called for substantial completion of the CATV system within two years. How-

ever, on written application of plaintiff, the City extended the completion date to December 20, 1970.

Early in 1970 the Court of Appeals for the Sixth Circuit held that two ordinances substantially similar to the Owensboro Ordinance were unconstitutional because they imposed a gross receipts tax upon proceeds from interstate commerce. Wonderland Ventures, Inc. v. City of Sandusky, Wonderland Ventures, Inc. v. City of Fremont, 423 F. 2d 548 (6th Cir. 1970). Thereafter, plaintiff filed an action in this Court seeking a declaration that Ordinance 63-65 is unconstitutional and a determination of the rights and liabilities of the parties under the 1965 agreement.

On November 6, 1970, the Board of Commissioners of the City of Owensboro approved Resolution No. 56-70 wherein it was conceded that the provision of Ordinance No. 63-65 calling for payment to the City of a certain percentage of the franchise purchaser's gross income "is invalid and unenforceable under Article I, Section 8, Clause III of the Constitution of the United States". Defendants have now filed a motion to dismiss the complaint for lack of jurisdiction over the subject matter on the ground that there is no disagreement between the parties regarding the only federal question raised by the complaint. In its response to the motion to dismiss plaintiff urges us to declare Ordinance No. 63-65 unconstitutional and to reach the questions of Kentucky law under the theory of pendent jurisdiction.

Section 2201 of Title 28, United States Code, requires that in every suit for a declaratory judgment an *actual controversy* exist between the parties. In this section the term "controversy" is used in its constitutional sense. U. S. Const. Art. III, §2, cl. 1; Public Service Commission of Utah v. Wycoff Co., Inc., 344 U. S. 237 (1952); Muller v. Olin Mathieson Chemical Corp., 404 F. 2d 501 (2nd Cir. 1968). It is hornbook law that a federal court has no power

to hear claims that do not satisfy the "case or controversy" requirement of the Constitution. United Public Workers of America (C.I.O.) v. Mitchell, 330 U. S. 75 (1947); Muskrat v. United States, 219 U. S. 346 (1911). If for any reason a federal court lacks jurisdiction to hear the only federal claim before it, absent diversity of citizenship it cannot reach other questions of state law raised by the complaint. United Mine Workers of America v. Gibbs, 383 U. S. 715 (1966); California Water Service Co. v. Redding, 304 U. S. 252 (1938).

Questions regarding the "case or controversy" requirement most commonly arise when the facts indicate that the *interests* of the parties are not sufficiently adverse. Usually it is clear from the pleadings that the parties disagree on some point of law. In the case at bar, curiously enough, the usual situation is reversed. While the pleadings and motions clearly indicate that the interests of the parties are adverse, both sides apparently are in complete agreement regarding the only federal question raised.

Counsel have cited no cases directly on point in their supporting memoranda, and we also have been unable to find any. However, after careful consideration, we have concluded that neither the framers of the Constitution nor the Congress could have intended us to rule on a question of constitutional law concerning which no disagreement exists between the parties, merely for the purpose of reaching additional state law questions under the theory of pendent jurisdiction. State issues predominate in this case, and we think that their resolution should be left to the courts of Kentucky. Accordingly, we hold that no actual controversy exists between the parties as to the only federal question raised by the complaint, and that therefore we lack jurisdiction to rule on both the constitutionality of Ordinance No. 63-65 and on the rights and liabilities of the parties under Kentucky law.

In view of our disposition of this case it is unnecessary to rule on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Defendants' motion to dismiss for lack of jurisdiction over the subject matter is SUSTAINED.

November 19, 1970

/s/ James F. Gordon
United States District Judge

Copies to:
Hon. Joseph H. McKinley
Hon. E. Stratford Smith
Hon. Hugh D. Moore

EXHIBIT 6

RESOLUTION NO. 60-67

RESOLUTION AUTHORIZING EXTENSION OF TIME FOR COMPLETION OF CATV SYSTEM IN OWENSBORO.

WHEREAS, the Top Vision Cable Company, holder of a CATV Franchise for the City of Owensboro, has requested the Board of Commissioners by letter dated October 5, 1967, that the two year period provided for in its franchise during which its CATV system shall be completed, be extended for an additional twelve months due to its operations being halted by hearing currently pending with the Federal Communications Commission; and

WHEREAS, the Board of Commissioners is aware of the matters now pending between the Top Vision Cable Company and the Federal Communications Commission and deem said request for an extension of time to be reasonable;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. That the request of the Top Vision Cable Company for a twelve (12) month extension of the time within which the construction of its system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro be, and the same is hereby granted.

Introduced, publicly read, rules suspended and finally approved on one reading this October 6, 1967.

(s) Irvin Terrill
Mayor Pro Tem

Attest:
(s) Adelle Shelton
City Clerk

October 5, 1967

Board of Commissioners
City of Owensboro, Kentucky

Max N. Rhoads, City Manager

Re: CATV Franchise
Completion Date

Gentlemen:

Referring to Article 12 in our Franchise granted December 17, 1965, it states "that the construction of such system shall be completed to the extent of making available community antenna service to substantially all of the citizens of Owensboro, Ky., on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof."

Due to circumstances beyond our control, a situation you gentlemen are well aware of has hindered us from con-

struction work as we had planned. At the present time we have 55 miles of system in operation and have another 100 miles to complete.

As per the provision made in our franchise, we are asking for an extension of 12 months from the date the FCC grants us a permanent waiver.

Very truly yours,

Drexel V. Bates
Chairman of the Board

DVB:jd

EXHIBIT 7

RESOLUTION NO. 66-68

RESOLUTION GRANTING EXTENSION OF TIME TO DECEMBER 20, 1970 FOR CONSTRUCTION OF CATV SYSTEM WITHIN CITY OF OWENSBORO, KY.

WHEREAS, the City of Owensboro has heretofore granted to Top Vision Cable Company, Inc. the Franchise created by Ordinance No. 63-65, which provides for the operation of a CATV system in the City of Owensboro, and

WHEREAS, Section 12 of said Franchise provides that the Board of Commissioners of the City of Owensboro may, in its discretion for cause, extend the time therein specified for the completion of said system within the City, and

WHEREAS, since the granting of said Franchise the Federal Communication Commission has adopted regulations which would adversely affect the contemplated operation of said system within the City, and

WHEREAS, the said Top Vision Cable Company, Inc. has agreed to institute proceedings before the Federal Communication Commission in an effort to relieve the CATV System in the City of Owensboro from the operation of certain restrictive regulations of said Commission, said pro-

ceedings being novel in character and constituting a "test case", and

WHEREAS, the Board of Commissioners deem the unforeseen stringent regulation of the Federal Communication Commission now in force and the proposed proceedings challenging them, sufficient cause for granting the written application of Top Vision Cable Company, Inc. for an extension of time within which to complete its system within the City.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

SECTION 1. Top Vision Cable Company, Inc. is hereby granted an extension of time to and including December 20, 1970, to substantially complete construction of a CATV system within the City of Owensboro as provided in the Franchise from the City for said system heretofore granted.

Introduced, publicly read and approved on one reading this December 20, 1968.

/s/ C. Waitman Taylor, Jr.
Mayor

Attest:
/s/ Adelle Shelton
City Clerk

October 5, 1967

Board of Commissioners
City of Owensboro, Kentucky

Max N. Rhoads, City Manager

Re: CATV Franchise
Completion Date

Gentlemen:

Referring to Article 12 in our Franchise granted December 17, 1965, it states "that the construction of such system shall be completed to the extent of making avail-

able community antenna service to substantially all of the citizens of Owensboro, Ky., on or before two (2) years from the date hereof or this franchise shall be and become null and void without notice or further act by the party of the first part. For cause, in its sole discretion, the Board of Commisioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof."

Due to circumstances beyond our control, a situation you gentlemen are well aware of has hindered us from construction work as we had planned. At the present time we have 55 miles of system in operation and have another 100 miles to complete.

As per the provision made in our franchise, we are asking for an extension of 12 months from the date the FCC grants us a permanent waiver.

Very truly yours,

Drexel V. Bates
Chairman of the Board

DVB:jd